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COURT OF CRIMINAL APPEALS
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CASE NO. PD-0561-18

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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

LISANDRO BELTRAN DE LA TORRE,
Appellant

VS.

THE STATE OF TEXAS,
Appellee

On Petition for Discretionary Review from
The First Court of Appeals
In No. 01-17-00218-CR Affirming the
Judgment of Conviction in Cause No. CR-16-082 from the
25th Judicial District Court of
Colorado County, Texas

APPELLANT'S REPLY BRIEF

STEVEN J. LIEBERMAN
TBA NO. 12334020
712 MAIN, SUITE 2400
HOUSTON, TEXAS 77002
TELEPHONE: (713) 228-8500
FACSIMILE: (713) 228-0034
SLIEBER699@AOL.COM

COUNSEL FOR APPELLANT,
LISANDRO BELTRAN DE LA TORRE

IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 38.1(a), the following is a list of all parties to the trial court's judgment as well as the names and addresses of trial and appellate counsel.

Presiding Judge
The Honorable William D. Old III
25th Judicial District Court
Columbus, Colorado County, Texas

Attorneys for Appellee (State of Texas)
Carolyn Crofton Olson (at trial)
Jay Elgin Johannes (at trial and on appeal)
Colorado County Attorney's Office
400 Spring Street, Suite 204 West
Columbus, Texas 78934

Stacey M. Soule (on appeal)
Emily Johnson-Liu
State Prosecuting Attorney
PO Box 13046
Austin, Texas 78711

Attorneys for Appellant
Carlos Armando Rodriguez (at trial)
Celenne Anne Beck (at trial)
3601 Navigation Blvd
Houston, Texas 77003

Steven J. Lieberman (on appeal)
712 Main St., Suite 2400
Houston, Texas 77002

Appellant
Lisandro Beltran De La Torre

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2. The Court Of Appeals Erred In Alternatively Holding It Was Not Error To Refuse Appellant's Requested Jury Instruction On "Mere Presence" While Holding The Jury Instruction On "Joint Possession" Was Appropriate

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

While Appellant does not take issue with the State's recitation of the Statement of the Case, he challenges all factual assertions in the State's brief. This reply brief is timely filed if filed by January 22, 2019. *See* TEX. R. APP. P. 38.6(c).

GROUNDS FOR REVIEW

1. The Court Of Appeals Erred In Holding The Trial Court Did Not Improperly Comment On The Evidence By Providing A Jury Instruction On "Joint Possession" That Added To The Statutory Definition Of "Possession"

2. The Court Of Appeals Erred In Alternatively Holding It Was Not Error To Refuse Appellant's Requested Jury Instruction On "Mere Presence" While Holding The Jury Instruction On "Joint Possession" Was Appropriate

APPELLANT'S REPLY TO STATE'S RESPONSE

A. The Absence Of A Jury Instruction On Joint Possession Does Not Require The State To Prove, Or The Jury To Find, Sole And Exclusive Possession.

It is undisputed that the jury instruction exceeded the statutory definition of "possession" as provided by TEX. HEALTH & SAFETY CODE §481. 002(38). Although the State correctly asserts that it does not have

to prove sole possession, the absence of a jury instruction on joint-possession neither places that burden on the State nor does it require the jury to find "possession" is sole and exclusive. Furthermore, Appellant did not argue that possession had to be sole and exclusive.

The State speculates that without the instruction "a lay person could easily equate 'actual care, custody, control, or management' with *exclusive* care, custody, control or management." State's Brief at 9. Based on the facts of a particular case, the jury as fact-finder is tasked with finding whether the State proved the defendant knowingly exercised care, custody, control, or management. The jury is not expected to wrestle with making a legal conclusion, as suggested by the State when it made a comparison with the legal concept of "reasonable suspicion." State's Brief at 9.[1] A jury instruction addressing the definition of "possession" as set out in the Texas Health & Safety Code provides the only guidance needed for a jury to determine whether the state has met its burden of proof, and in no way restricts the state to having to prove "sole" possession.

[1] *Citing Madden v. State*, 242 S.W.3d 504, 511 (Tex. Crim. App. 2007).

B. The Joint-Possession Instruction was a Comment on the Weight of the Evidence

The State acknowledges that a jury instruction constitutes a prohibited comment on the weight of the evidence if it focuses the jury's attention on a specific type of evidence that may support an element of an offense. *See Walters v. State*, 247 S.W.3d 204, 212 (Tex. Crim. App. 2007). In the instant case the State appears to suggest, *albeit* without support, that the joint-possession instruction was not an improper comment on the evidence only because it "unnecessarily" focused attention on particular evidence. State's Brief at 13.

The State's attempt to qualify the effect of the instruction disregards Appellant's evidence that he had no knowledge of the controlled substance and three other persons were present, each of whom could have been the source of the cocaine. In light of the facts of the instant case, the joint-possession instruction was an improper comment on the evidence regardless of how the State chooses to characterize it.

C. "Mere Presence" was Not Covered by the General Charge

The State argues on the one hand that a joint-possession instruction is necessary to assist a lay person on the jury while on the other hand arguing that no such assistance is needed by providing a mere

presence instruction outside of the general charge. First, even a broad reading of the general charge does not address "mere presence" in the context of the charged offense. Once the trial court instructed the jury on joint-possession it should then have instructed the jury on the associated law of mere presence. This is supported by the State's citation to the State Bar Pattern Jury Charge Committee's commentary. State's Brief at 18.

Next, the State argues on the one hand that the joint-possession instruction did not "unnecessarily" focus the attention of the jury and would mislead them. State's Brief at 19. Since the trial court started the process of instructing the jury on joint possession, it must complete the process by giving an accurate statement of the law, which included an instruction on mere presence. The combination of Appellant's denial that he had knowledge of the controlled substance with the joint-possession instruction made an instruction on mere presence crucial to Appellant's defense. *See Vasquez v. State*, 389 S.W.3d 361, 371 (Tex. Crim. App. 2012).

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that the judgment of the Court of Appeals be reversed and a new

trial ordered. In the alternative, Appellant respectfully prays that the judgment be reversed and the case remanded to the Court of Appeals for further proceedings.

Respectfully submitted,

/s/ Steven J. Lieberman
STEVEN J. LIEBERMAN
TBA NO. 12334020
712 MAIN, SUITE 2400
HOUSTON, TEXAS 77002
TELEPHONE: (713) 228-8500
FACSIMILE: (713) 228-0034
EMAIL: SLIEBER699@AOL.COM

COUNSEL FOR APPELLANT,
LISANDRO BELTRAN DE LA TORRE

CERTIFICATE OF COMPLIANCE

The word count of the countable portions of this computer-generated document specified by Rule of Appellate Procedure 9.4(i), as shown by the representation provided by the word-processing program that was used to create the document, is 1,420 words. This document complies with the typeface requirements of rule 9.4(e), as it is printed in a conventional 14-point typeface with footnotes in 12-point typeface.

/s/ Steven J. Lieberman
STEVEN J. LIEBERMAN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief on Discretionary Review was served via e-mail delivery through eFile.TXCourts.gov to Jay Johannes, Colorado County Attorney's Office, and Emily Johnson-Liu, State Prosecuting Attorney on this the 16th day of January, 2019.

/s/ Steven J. Lieberman
STEVEN J. LIEBERMAN